

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF PUBLIC SAFETY

In the Matter of the Proposed Rules of the
Minnesota Department of Public Safety
Governing Credit and Debit Card
Acceptance by Driver's License Agents and
Deputy Registrars; Minnesota Rules
7404.0100; 7404.0400; 7404.0450;
7404.0500; 7406.0100; 7406.0400;
7406.0450; and 7406.0500.

**ORDER ON REVIEW OF
RULES UNDER MINNESOTA
STATUTES, SECTION 14.26**

The Minnesota Department of Public Safety ("Department" or "DPS") is seeking review and approval of the above-entitled rules, which were adopted by the Department without a hearing. This review and approval is governed by Minn. Stat. § 14.26. On March 21, 2011, the Office of Administrative Hearings ("OAH") received the documents that must be filed by the Department under Minn. Stat. § 14.26 and Minn. R. 1400.2310.

Based upon a review of the written submissions and filings, and for the reasons set out in the Memorandum which follows,

IT IS ORDERED:

1. The Department has the statutory authority to adopt the proposed amendments to Minnesota Rules Chapter 7406 (relating to deputy registrars); however, the Department lacks the statutory authority to adopt the proposed amendments to Minnesota Rules Chapter 7404 (relating to driver's license agents). Accordingly, the Department's proposed amendments to Chapter 7404 are **DISAPPROVED** as not meeting the requirements of Minn. Stat. § 14.26, subd. 3(a), and Minnesota Rules part 1400.2100, item D.

2. The rules were not adopted in compliance with all procedural requirements of Minnesota Statutes, chapter 14, and Minnesota Rules, chapter 1400; however, the error made by the Department was harmless in nature and should be disregarded.

3. The proposed amendments to Chapter 7406 are needed and reasonable.

4. Pursuant to Minnesota Statutes, section 14.26, subdivision 3(b), and Minnesota Rules, part 1400.2300, subpart 6, the rules will be submitted to the Chief Administrative Law Judge for review.

Dated: April 4, 2011

/s/ Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

The Department has submitted these rules to the Administrative Law Judge (“ALJ”) for review under Minn. Stat. § 14.26. Subdivision 3(a) of that statute specifies that the ALJ must approve or disapprove the rules as to their legality and form. In conducting the review, the ALJ must consider the issue of whether the agency has the authority to adopt the rules; whether the record demonstrates a rational basis for the need for and reasonableness of the proposed rules; and whether the rules as modified are substantially different from the rules as originally proposed.

The rules of the Office of Administrative Hearings identify several types of circumstances under which a rule must be disapproved by the Administrative Law Judge or the Chief Administrative Law Judge.¹ These circumstances include situations in which a rule exceeds, conflicts with, does not comply with, or grants the agency discretion beyond what is allowed by, its enabling statute or other applicable law; a rule was not adopted in compliance with procedural requirements, unless the Judge finds that the error was harmless in nature and should be disregarded; a rule is not rationally related to the agency’s objectives or the agency has not demonstrated the need for and reasonableness of the rule; a rule is substantially different than the rule as originally proposed and the agency did not comply with required procedures; a rule is unconstitutional² or illegal; a rule improperly delegates the agency’s powers to another entity; or the proposal does not fall within the statutory definition of a “rule.”

These standards guide the determinations set forth below.

I. Statutory Authority Defect regarding Proposed Amendments to Minnesota Rules 7404.0100, 7404.0400, 7404.0450, and 7404.0500

Deputy registrars and driver’s license agents process various types of motor vehicle and driver’s license transactions. Deputy registrars are governed by Minn. Stat. § 168.33, and driver’s license agents are governed by Minn. Stat. § 171.061. Under rules adopted by the Department, all deputy registrars must also be appointed by the

¹ Minn. R. 1400.2100 (2009).

² In order to be constitutional, a rule must be sufficiently specific to provide fair warning of the type of conduct to which the rule applies. See, *Cullen v. Kentucky*, 407 U.S. 104, 110 (1972); *Thompson v. City of Minneapolis*, 300 N. W.2d 763, 768 (Minn. 1980).

Commissioner to assume the duties of a limited licensing agent.³ In addition, deputy registrars may, if they wish, apply to the Commissioner for unlimited appointment as a licensing agent.⁴ However, licensing agents do not necessarily perform the duties of deputy registrars.

The primary catalyst for the proposed rules was a 2009 amendment to the statute governing deputy registrars. After the 2009 amendment, the following new paragraph (b) was added to Minn. Stat. § 168.33, subd. 7:

The fees imposed under paragraph (a) may be paid by credit card or debit card. The *deputy registrar* may collect a surcharge on the fee not to exceed the cost of processing a credit card or debit card transaction, in accordance with emergency rules established by the commissioner of public safety.⁵

The 2009 amendment was effective for fees collected after July 31, 2009.⁶ Paragraph (b) was further amended in 2010, and currently states:

The statutory fees and taxes, and the filing fees imposed under paragraph (a) may be paid by credit card or debit card. The *deputy registrar* may collect a surcharge on the statutory fees, taxes, and filing fee not greater than the cost of processing a credit card or debit card transaction, in accordance with emergency rules established by the commissioner of public safety. The surcharge must be used to pay the cost of processing credit and debit card transactions.⁷

The amendments to Minn. Stat. § 168.33, subd. 7(b), along with the general rulemaking authority given to the Department under subdivision 9 of the same statute, clearly provide proper statutory authority for the portion of the Department's proposed rules that applies to deputy registrars (i.e., the amendments to Chapter 7406). However, the Legislature restricted the language of those amendments to deputy registrars, and did *not* amend Minn. Stat. § 171.061 to incorporate similar language relating to driver's license agents. The Legislature's failure to enact a similar amendment compels the conclusion that it did not intend to authorize the acceptance of credit and debit cards or the collection of surcharges by such agents.

In its Statement of Need and Reasonableness regarding the proposed rules, the DPS also relied upon its general authority under Minn. Stat. § 171.061, subd. 6, to promulgate rules relating to driver's license agents.⁸ That statute specifies that the Department shall adopt rules that prescribe certain procedures and requirements

³ See Minn. R. 7404.0340. A limited licensing agent accepts applications only for a duplicate driver's license or duplicate Minnesota identification card. See Minn. R. 7404.0340, subp. 2.

⁴ See Minn. R. 7404.0345.

⁵ 2009 Minn. Laws, Chapter 152, Section 2 (emphasis added).

⁶ *Id.*

⁷ 2010 Minn. Laws, Chapter 382, Section 38; Minn. Stat. § 168.33, subd. 7(b) (emphasis added).

⁸ Statement of Need and Reasonableness at 5-6.

applicable to driver's license agents, including "standards for the uniform administration of laws and rules governing the receipt of applications and fees for applications," "criteria for . . . operation . . . of a license application office," and "standards for submitting applications including . . . depositing funds." However, in light of the Legislature's apparent intent to allow only deputy registrars to accept payment by credit or debit cards and collect surcharges, the ALJ does not agree that the general grant of rulemaking power contained in Minn. Stat. § 171.061, subd. 6, provides proper statutory authority for the Department's proposal to grant driver's license agents the same authority.

Accordingly, the ALJ concludes that statutory authority is lacking for the proposed amendments to Chapter 7404. To cure this defect, and to be consistent with the authorizing legislation, the DPS must withdraw the proposed amendments to Minnesota Rules 7404.0100, 7404.0400, 7404.0450, and 7404.0500.

II. Procedural Defect (Harmless Error) relating to Failure to Publish Request for Comments within 60 days of Effective Date of the Authorizing Statute

The APA requires in Minn. Stat. § 14.101 that agencies must solicit comments from the public on the subject matter of a possible rulemaking proposal under active consideration within the agency by causing a notice to be published in the State Register "within 60 days of the effective date of any new or amendatory law requiring rules to be adopted, amended, or repealed." As pointed out above, the Department's statutory authority for the proposed rules became effective on August 1, 2009. Accordingly, the Commission should have published its Request for Comments on or before October 1, 2009, as required by Minn. Stat. § 14.101. However, the Department did not publish the Request for Comments until October 25, 2010. The Request for Comments noted that the Department had prepared a draft of the possible rule amendments and provided the name of an individual who could be contacted to receive a draft of the rule.

Based on the Department's submission regarding the proposed rules, it is evident that the reference to "emergency rulemaking" in the 2009 grant of rulemaking authority⁹ created some confusion and delay for the agency because the Minnesota Administrative Procedure Act (APA)¹⁰ does not set forth a procedure for adopting "emergency" rules.¹¹ The Department indicated that it initially sought to promulgate these rules under the APA's good-cause exemption.¹² That exemption sets forth certain streamlined procedures that may be followed by an agency seeking to adopt, amend, or repeal a rule if the agency for good cause finds that the more typical rulemaking provisions set forth in the APA are "are unnecessary, impracticable, or contrary to the public interest" and the proposed rule (1) "address[es] a serious and immediate threat to the public health, safety, or welfare;" (2) is necessary to "comply with a court order or

⁹ 2009 Minn. Laws, Chapter 152, Section 2.

¹⁰ Minnesota Statutes, Chapter 14.

¹¹ Other Minnesota laws authorize the Commissioner of Natural Resources to adopt emergency rules in particular circumstances. See Minn. Stat. § 84.027 and 97A.0451-0459 (2008).

¹² Minn. Stat. § 14.388.

a requirement in federal law that does not allow for compliance” with the typical rulemaking process; (3) “incorporate[s] specific changes set forth in applicable statutes when no interpretation of law is required;” or (4) “make[s] changes that do not alter the sense, meaning, or effect of a rule.”¹³ As the Department proceeded to develop the rule, it apparently determined that the good cause exemption was not a good fit and elected to begin the process to promulgate the rules in accordance with the typical rulemaking procedural requirements. Accordingly, the Department published its notice soliciting comments from the public on the subject matter of the proposed rules on October 25, 2010.

The question is whether this defect regarding publication of the Request for Comments is a harmless error. A procedural defect can be considered a harmless error under Minn. Stat. § 14.26, subd. 3(d), if: “(1) the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process; or (2) the agency has taken corrective action to cure the error or defect so that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process.”

The language of Minn. Stat. § 14.101 is directory in nature and not mandatory. There is no specified penalty under section 14.101 for failure to comply. This differs from section 14.125, which explicitly states that an agency’s authority will expire if it fails to comply with that provision.¹⁴ Presumably, the purpose of the requirement that an agency publish a Request for Comments within 60 days of the effective date of its authorizing legislation is to ensure that an agency begins the process of public notification so that it will stay on schedule to publish its Notice of Intent to Adopt Rules within 18 months, as required by Minn. Stat. § 14.125.

In this instance, due to the reference to “emergency” rules contained in the authorizing legislation, the Department did not initially realize that it had to comply with all of the rulemaking requirements of the APA. Once it became aware of its obligations, the Department moved quickly, in good faith, to publish its Request for Comments. It provided copies of that Request to all persons who had requested notice of DPS rulemaking, published it on the Driver and Vehicle Services (DVS) website, and added notice of the rulemaking to the DVS’s main web page. The Department also attempted to identify and notify persons or classes of persons who would be significantly affected by the proposed rules. The Request for Comments was published more than sixty days before the Notice of Intent to Adopt the Rules was published, and the comment period remained open until the Notice was published. When it issued its Notice of Intent to Adopt the Rules, the Department again provided the required notice of the proposed rules to persons on the agency’s mailing list and placed notice on the DVS main page and the Department’s public notices webpage. It also provided additional notice to an expansive group of persons, including all deputy registrars and driver’s license agents;

¹³ *Id.*, subd. 1.

¹⁴ Minn. Stat. § 14.125 states, “An agency shall publish a notice of intent to adopt rules or a notice of hearing within 18 months of the effective date of the law authorizing or requiring rules to be adopted, amended, or repealed. If the notice is not published within the time limit imposed by this section, the authority for the rules expires.”

the Minnesota Deputy Registrar Association and its lobbying firm; the Minnesota Inter-County Association; the Minnesota Association of County Officers; the Association of Minnesota Counties; the League of Minnesota Cities; Minnesota Management and Budget; the Department of Natural Resources; Anoka, Hennepin, Stearns, and Washington Counties; and those who had responded to the Request for Comments. After publishing the Notice of Intent to Adopt the Rules, the Department received only four comments and no requests for hearing.¹⁵

Because the language of § 14.101 is directory and not mandatory, and because the ALJ does not believe that the procedural error in the timing of the publication of the Request for Comments deprived anyone of the opportunity to meaningfully participate in the rulemaking process, the ALJ finds this procedural defect to be harmless.

III. Recommended Technical Corrections

In the event that the Department chooses to withdraw the proposed amendments to Chapter 7404 and proceed with the proposed amendments to Chapter 7406, the Administrative Law Judge has set forth some recommended language changes to the Chapter 7406 rules. These changes reflect the intent of the Department, are consistent with Minnesota Statutes, Chapter 168, and do not make the rules substantially different from those published in the State Register on January 18, 2011.

Minn. R. 7406.0450, Subpart 1a

As proposed, Item A of Subpart 1a states that the deputy registrar shall, at the daily close of office records, settle the batch containing credit card and debit card transactions “according to procedures approved by the commissioner.” It is recommended that this language be changed to refer to “procedures *prescribed* by the commissioner,” in order to clarify that deputy registrars must follow procedures established by the commissioner rather than submit their own proposed procedures for approval by the commissioner. Such a clarification is needed and reasonable and would not make Item A substantially different than originally published in the State Register.

Minn. R. 7406.0500, Subpart 7a

Item A

As proposed, the first sentence of Item A of Subpart 7a merely sets forth the broad requirement that “[a] deputy registrar shall accept credit cards and debit cards as

¹⁵ It is not clear from the record whether or not the Department responded to any of these individuals in writing. A response to each comment is not required by the APA and a failure to respond to public comments does not constitute a defect in the proposed rules. However, responding to public comments increases the public accountability of administrative agencies and encourages public participation in the formulation of administrative rules, in keeping with the purposes of the APA (see Minn. Stat. § 14.001). Unless the agency provides a written response, those who submitted comments will be uncertain whether the agency considered their concerns. In addition, inclusion of written responses in the record would facilitate the ALJ’s review and evaluation of the proposed rules.

a method of payment for motor vehicle transactions.” It is recommended that the phrase “unless a variance is granted under subpart 7b” (or words of similar import) be added to the first sentence to more clearly convey to the regulated public that those who apply for and receive a variance will not be subject to the general requirement. This recommended change would be consistent with the intent of the Department, is needed and reasonable, and would not make Item A substantially different than originally proposed.

Items B, C and D

The ALJ recommends that the references to “agent” set forth in Item B and subitems B(1) and (3); Item C(1) and (2); and Item D be replaced with “deputy registrar” in order to clarify to whom the rules apply. In addition, the citation set forth in Item D should be corrected to refer to part 7406.0400, subpart 3a. These recommended changes would be consistent with the intent of the Department, are needed and reasonable, and would not make these portions of the rules substantially different than originally proposed.

Minn. R. 7406.0500, Subpart 7b

It is recommended that the third sentence in subpart 7b¹⁶ be deleted because it contains the same information as the fourth sentence.¹⁷ This change would eliminate unnecessary language from the rules, is needed and reasonable, and would not make Subpart 7b substantially different than the rule as originally proposed.

B. L. N.

¹⁶ As proposed, this sentence states, “A deputy registrar shall submit a written request to the commissioner for a variance to subpart 7a.”

¹⁷ The fourth sentence states, “Application for a variance may be made by submitting a written request to the commissioner according to this subpart.”